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Michael J. Gerhardt

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## FEDERAL JUDICIAL SELECTION AS WAR, PART THREE: THE ROLE OF IDEOLOGY

*Michael J. Gerhardt\**

### I. INTRODUCTION

The immediate backdrop for this symposium leaves no doubt about federal judicial selection as war. Over the past year, Democrats and Republicans on the Senate Judiciary Committee have frequently experienced conflict over the appropriate bases for choosing judicial nominees and evaluating the merits of their nominations in the confirmation process. These conflicts were especially apparent when the Senate Judiciary Committee, not once but twice, in relatively short order, rejected President Bush's nominees to federal courts of appeal.<sup>1</sup> In neither case was it obvious that the nominee lacked the credentials for elevation. The first rejected nominee was Charles Pickering, a federal district judge in Mississippi, while the second was Priscilla Owen, an associate justice of the Texas Supreme Court. In each case, the nominee's ideology was cited as a basis for his or her rejection,<sup>2</sup> and in

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\* Arthur B. Hanson Professor of Law, William & Mary Law School. In this as well as other works on federal judicial selection, I owe a special debt of gratitude for the pioneering work done by Sheldon Goldman, Elliot Slotnick, and Carl Tobias.

I am honored to participate in Regent University Law School's special program on the role of ideology in federal judicial selection. I am particularly flattered and appreciative to be in the company of two veteran commentators and participants in the process, Roger Pilon and Thomas Jipping.

My speech today is the third in a series of commentaries on federal judicial selection as war. In my first speech on this topic, I focused on the selection of Supreme Court justices as war. In the second, I examined the selection of lower court judges as war. This third speech has a lot in common with my second. I intend still to look at lower court judicial appointments as war, but today I do so with special emphasis on how ideology has triggered (or helped to contribute) to conflict in the process.

As I have crisscrossed the country over the past year to speak on federal judicial selection as war, I have been struck by the realization that I appear to be among the last of a dying breed. I think of myself as a moderate, but there seem to be few moderates on the question of how federal judicial selection should proceed. So, it is fitting today that I am sandwiched between Roger and Tom, where my moderate views can be easily crushed between their very forceful arguments. Nevertheless, I hope there is much common ground among us. My intention is less to point out anything wrong in their visions of the process but rather to provide a slightly different framework with which to analyze the propriety or legitimacy of current activity in the judicial selection process, a framework that I hope can be used for putting all of our comments into historical perspective.

<sup>1</sup> Neil A. Lewis, *Democrats Reject Bush Pick in Battle Over Court Balance*, N.Y. TIMES, Sept. 6, 2000, at A1.

<sup>2</sup> *Id.*; Helen Dewar, *Senate Panel Rejects Bush Appointee*, WASH. POST, Sept. 6, 2002, at A01.

each case, the coverage of the process emphasized that the activity was part of a battle over the future of the federal judiciary.<sup>3</sup>

The Senate Judiciary Committee's rejections of these two nominations seem to confirm the threat made at the outset of George W. Bush's presidency by some prominent Democratic senators, strategists, and commentators. The threat was that there would be a "war" if, after the Supreme Court's controversial opinion in *Bush v. Gore*<sup>4</sup> short-circuiting Vice-President Gore's challenge to the vote count in Florida and effectively awarding the presidency to him, Bush tried to claim a mandate to nominate conservative ideologues outside of the mainstream of constitutional jurisprudence.<sup>5</sup> After September 11, 2001, some Republican senators and administration officials suggested, however, that the war against terrorism obliges senators (and others) to give the President's judicial nominees special deference to facilitate domestic tranquility and ensure a fully staffed judiciary available to properly monitor and process criminal proceedings coming out of the war against terrorism.<sup>6</sup> They explained further that the President's judicial nominations generally require substantial deference so that they do not divert the precious time and political capital President Bush needs to wage the war effort successfully. Still others maintained that, apart from the war on terrorism, the President's judicial nominees deserve more respect in the process than they are getting; at the very least, they deserve hearings and final votes on their nominations by the entire Senate. This argument is especially true for President Bush's judicial nominees because, in their supporters' judgment, they have had stellar legal careers, and the only plausible basis for their rejection is not a lack of qualifications but rather hostility to their (suspected) ideologies.

The most serious problem with these arguments is that the structure of the Constitution is plainly designed to invite conflict.<sup>7</sup> Anyone familiar with the process of judicial selection knows just how

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<sup>3</sup> Dewar, *supra* note 2; Lewis, *supra* note 1.

<sup>4</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>5</sup> See, e.g., *Should Ideology Matter? Judicial Nominations 2001*, Hearing of the Subcomm. on Admin. Oversight and the Courts Before the Senate Comm. on the Judiciary, 106th Cong. (2001) (prepared statement of Laurence H. Tribe, Tyler Professor of Constitutional Law, Harvard Law School), available at <http://judiciary.senate.gov/oldsite/te062601tri.htm> (June 26, 2001); Thomas B. Edsall, *Ashcroft Will Face a Grilling in Senate; Fights Looming on Judicial Choices*, WASH. POST, Dec. 25, 2000, at A01; Robin Toner, *Interest Groups Set for Battle on a Supreme Court Vacancy*, N.Y. TIMES, Apr. 21, 2001, at A1.

<sup>6</sup> See, e.g., *Rehnquist Calls on Senate to Step Up Pace of Judicial Confirmations*, BULL. FRONTRUNNER, Jan. 2, 2002; Linda Gasparello, *Cheney to Senate: Set Judges Free (64 of Them)*, 29 WHITE HOUSE WKLY. 223 (Nov. 20, 2001).

<sup>7</sup> See generally MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2000) [hereinafter *FEDERAL APPOINTMENTS PROCESS*].

combative and vitriolic contests over judicial appointments can be. Though not always short, their nastiness and brutality seem otherwise to exemplify the infamous conditions Thomas Hobbes had described as existing within the state of nature.<sup>8</sup> The structure of the Constitution pits presidents and senators against each other in the federal appointments process, and the framers fully expected, even hoped, that conflicts would ensue from this design.<sup>9</sup> Their expectation was that the checks and balances of the Constitution, including the distribution of authority on judicial appointments, were designed, in Madison's famous phrasing, so that "ambition must be made to counteract ambition."<sup>10</sup> The framers viewed conflicts as inevitable and even desirable, as each branch sought to aggrandize its powers at the expense of the other. The ensuing friction would prevent one branch from becoming tyrannical.

Yet, the structure of the Constitution invites not only conflicts, but also accommodations. In relatively short order, presidents and senators developed informal accommodations or informal arrangements to reduce the inevitability of conflict and yet preserve some realm of discretion with respect to judicial appointments. These accommodations, expectations, or arrangements are called institutional norms.<sup>11</sup> Following the institutional norms applicable to federal judicial selection generally produces peaceful coexistence between presidents and senators rather than sanctions.

Hostilities break out in the process for selecting lower-court judges when the governing institutional norms are in flux or when the President, senators, nominees, or all of these violate long-standing practices or expectations (some, but not all, of which constitute institutional norms). This basic dynamic persists regardless of whether the nation is at war.<sup>12</sup> History generally suggests that judicial appointments entail a give-and-take in which presidents and senators tussle or negotiate over their respective achievements of various short- and sometimes long-term objectives. How well presidents and senators achieve their respective objectives and discharge their all-important duties relating to judicial selection depends on their compliance with and coordination of the governing institutional norms and on expectations at the times appointments must be made. Presidents and senators obviously do not perform in a vacuum; context is all-important, but context does not guarantee particular outcomes. The fact that the nation

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<sup>8</sup> THOMAS HOBBS, *THE LEVIATHAN* 65 (Prometheus Books 1988) (1651).

<sup>9</sup> U.S. CONST. art. II, §2, cl. 2.

<sup>10</sup> *THE FEDERALIST* NO. 51 (James Madison).

<sup>11</sup> See Michael J. Gerhardt, *Norm Theory and the Future of the Federal Appointments Process*, 50 *DUKE L.J.* 1687 (2001) [hereinafter *Norm Theory*].

<sup>12</sup> For some prior discussions of this view, see *FEDERAL APPOINTMENTS PROCESS*, *supra* note 7; *Norm Theory*, *supra* note 11.

is at war is, of course, an important part of the context of present times, but it does not – and likely will not – make a difference to the process of judicial selection. A judicial appointment offers an opportunity both to presidents and to at least some senators. But presidents and senators are likely to view this opportunity differently depending on their respective calculations of their short- and long-term needs. The context in which they make their calculations includes not just war, but also the persistent or perennial needs (or impulses) for both presidents and senators, particularly from the opposition party, to reward friends, penalize foes, influence the direction of the lower court(s), and effectuate trading or deals to facilitate other legislative priorities or objectives.

My purpose is not to be exhaustive, but rather to illustrate some significant patterns in the selection of federal district and courts of appeals judges. Part II will clarify some basic terminology, discuss the relevance of statistics, and identify some of the basic institutional norms applicable to federal judicial selection. These norms include, among others, senatorial courtesy (easily the most robust of all the norms, including deference to either senators who have been nominated as judges, or to nominees preferred by the senators from the President's party); good faith consultation with the Senate, nominees' fitting the basic ethical and professional expectations of the times, making timely nominations, substantial senatorial discretion in pacing the confirmation process, following (or at least not altering) basic vetting procedures (including but not limited to allowing, until recently, the American Bar Association to formally rate prospective judicial nominees); and responsible rhetoric in framing the terms of initial debate.

With this general framework in mind, Part III will focus on conflicts between senators and presidents who have failed to adequately heed or account for a relatively robust institutional norm, long-standing practice, or expectation regarding judicial selection. These conflicts have followed two patterns. The first has involved presidents' attempts to re-shape some basic practices or procedures relating to judicial selection. Perhaps the most serious battle now occurring within the judicial appointments process is to develop a new norm or understanding regarding the requisite ideology for a judge. The second category of conflicts consists of presidents' failures to follow the governing norms in filling specific vacancies. The reasons for these failures have been varied, including, but not limited to, presidents' over-confidence or negligence, competing priorities, and payback.

Part IV consists of models of accommodation. The first is capitulation or presidential abdication of authority, as reflected throughout most of the nineteenth century and in this century and epitomized by the Harding administration. The second model consists of an overview of the strategies employed by presidents and senators to

achieve their respective objectives through negotiation or management of various institutional norms. This second model also encompasses the practices relating to appointing judges in the midst of war. As illustrated by a review of several wartime presidents, including Abraham Lincoln, Franklin Roosevelt, Lyndon Johnson, and Richard Nixon, presidents have been able to achieve relatively conflict-free confirmation proceedings for judicial nominees in the midst of war when *they*, rather than the Senate, have been willing to bend or compromise in defining the terms for judicial selection.

## II. TERMS OF ENGAGEMENT

A few introductory clarifications are in order. First, the following models reflect an important dynamic in the selection process. They are premised on the unusual power and opportunity that presidents have to set the terms of debate in a confirmation proceeding. Senators have more limited, though significant, power to set or influence the agenda in a confirmation proceeding because they are largely confined in the process to a defensive posture. In structural terms, senators face the structural disadvantage of being in a defensive posture throughout almost the entirety of the appointments process.<sup>13</sup> Senators have tried to compensate for their structural disadvantage through various means, including the development of various procedures and norms to facilitate the influence and input of individual senators, as well as the Judiciary Committee leadership, on judicial appointments.

Second, the basic terms of war and norms need to be defined. Neither definition will rely on strict terms of art. The terms "battle" and "war" will be used loosely, despite the important differences between them. It is useful to keep in mind that a contest over a particular judicial nomination is more like a battle than a war, for it generally reflects or is waged against a backdrop of larger contests among national political leaders. One important mechanism in these battles consists of institutional norms, which are the informal understandings or arrangements among the leadership of national institutions developed over time and deviations from which often trigger sanctions or disapproval.<sup>14</sup>

Third, it is very important to recognize the institutional norms applicable to the process of selecting lower court judges. The first and most robust of these is senatorial courtesy. Senatorial courtesy takes at least two forms in the appointments process.<sup>15</sup> The first is the deference

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<sup>13</sup> See John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process*, 71 TEX. L. REV. 633 (1993).

<sup>14</sup> *Norm Theory*, *supra* note 11, at 1688-89.

<sup>15</sup> For a general discussion, see FEDERAL APPOINTMENTS PROCESS, *supra* note 7, at 143-53.

usually, but admittedly not always, given by senators to the nomination of a colleague to a federal judgeship. The Senate confirmed all six senators nominated to the Court in the twentieth century: Edward Douglass White as Chief Justice, and as Associate Justices, George Sutherland, Hugo Black, Jimmy Byrnes, Harold Burton, and Sherman Minton.<sup>16</sup> While presidents have generally succeeded in nominating many former members of Congress, particularly from the House, to lower federal courts,<sup>17</sup> only two of these nominees were senators. In both cases – Truman's nomination of Sherman Minton to the Seventh Circuit and Ronald Reagan's nomination of James Buckley to the District of Columbia Circuit – the Senate overwhelmingly confirmed the nominees.<sup>18</sup> The second form of senatorial courtesy is the deference given by presidents to the choices of the senators from their parties for filling vacant federal judgeships in their respective states. I examine conflicts arising from breaches of this norm in more detail in the next part.

A second, significant norm is presidents' and senators' recognition of the importance of nominating people from their parties to lower-court judgeships. In the nineteenth century, party affiliation increasingly became a useful proxy and demonstration of a nominee's fidelity to a president's, or key senators', preferred constitutional ideology and policy views. Kermit Hall's excellent study of nineteenth-century lower-court judicial appointments demonstrates the increasing importance of partisanship in judicial appointments.<sup>19</sup> For instance, all of Grover Cleveland's lower-court appointees were Democrats.<sup>20</sup> The statistical breakdown of the party affiliations for modern presidents' appointees to lower courts reflects similar degrees of significance of partisanship in their selection, including Franklin Roosevelt (98.5% for district judges and 96% for circuit judges), Harry Truman (93.8% for district judges and 88.5% for circuit judges), Dwight Eisenhower (95.2% for district judges and 93.3% for circuit judges), John F. Kennedy and Lyndon Johnson (92.1% for district judges and 95.1% for circuit judges), Richard Nixon and Gerald Ford (89.6% for district judges and 93.0% for circuit judges), Jimmy Carter (90.6% for district judges and 82.1% for circuit judges),

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<sup>16</sup> SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY (Melvin J. Urofsky ed., 1994). Even people who have served in the House seem to have had their nominations receive substantial deference from the Senate. In the twentieth century, the former House members successfully nominated to the Court include William Moody as Associate Justice and Fred Vinson as Chief Justice. *Id.*

<sup>17</sup> See FEDERAL APPOINTMENTS PROCESS, *supra* note 7, at 129-30.

<sup>18</sup> Paul A. Freund, *Essays on the Supreme Court Appointment Process: Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1161 (1988); *James Buckley Confirmed as Federal Appeals Judge*, L.A. TIMES, Dec. 18, 1985, at 33.

<sup>19</sup> KERMIT HALL, THE POLITICS OF JUSTICE (1979).

<sup>20</sup> FEDERAL APPOINTMENTS PROCESS, *supra* note 7, at 129-30.

Ronald Reagan (91.7% for district judges and 96.2% for circuit judges),<sup>21</sup> George H.W. Bush (88.5% for district judges and 89.2% for circuit judges),<sup>22</sup> and Bill Clinton (87.5% for district judges and 85.2% for circuit judges).<sup>23</sup> Moreover, Sheldon Goldman calculates striking statistics to demonstrate the extent or percentage of a president's judicial appointments based on a "partisan agenda" or made "to shore up political support for the president or for the party."<sup>24</sup> According to Goldman, presidents from Truman through Clinton had percentages of circuit appointments made on the bases of partisan agendas ranging from a high of 100% for President Ford to a low of 25% for President Reagan, with every other president above 70%.<sup>25</sup>

There are several other institutional norms applicable to federal judicial selection. These norms include good faith consultation with the Senate; nominating people who satisfy prevailing ethical and professional expectations of the times;<sup>26</sup> responsible or credible rhetoric in characterizing nominees' credentials;<sup>27</sup> timing; and basic procedures for vetting and processing judicial nominations, including ratings of the quality of judicial nominees by the American Bar Association, a practice

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<sup>21</sup> SHELDON GOLDMAN, PICKING FEDERAL JUDGES 348, 355 (1997).

<sup>22</sup> Sheldon Goldman, *Bush's Judicial Legacy: The Final Imprint*, 76 JUDICATURE 282, 292-95 (1993) [hereinafter *Bush's Judicial Legacy*].

<sup>23</sup> Sheldon Goldman et al., *Clinton's Judges: Summing Up the Legacy*, 84 JUDICATURE 228, 245, 251 (2001) [hereinafter *Clinton's Judges*].

<sup>24</sup> GOLDMAN, *supra* note 21, at 3.

<sup>25</sup> See *id.* at 78, 130, 172, 208, 259, 307 (respectively, Truman, Eisenhower, Kennedy & Johnson, Nixon & Ford, Carter, Reagan); *Bush's Judicial Legacy*, *supra* note 22, at 285-86; *Clinton's Judges*, *supra* note 23, at 229-31.

<sup>26</sup> In his exhaustive study of federal judicial selection from Franklin Roosevelt through Reagan, Professor Goldman characterizes this norm as "the expectation that the president and his administration will ordinarily choose persons who have the education, experience, temperament, and reputation of legal acumen and integrity requisite for judicial office." GOLDMAN, *supra* note 21, at 4.

<sup>27</sup> This institutional norm is especially evident in Supreme Court selection. See Michael J. Gerhardt, *Supreme Court Selection as War*, 50 DRAKE L. REV. 393 (2002). It is often the case that each side in a judicial confirmation contest attempts to demonize the other. The objective of the supporters of a nomination has been to demonize people who oppose the nomination, while the opponents of a nomination have tended to demonize the nominee. Interestingly, the efforts to demonize opposition track the rhetoric employed in times of war. A recent headline in *The New York Times* suggestively reads, "A Nation Defines Itself by its Evil Enemies." Robert F. Worth, *A Nation Defines Itself by its Evil Enemies*, N.Y. TIMES, Feb. 24, 2002, § 4, at 1. The article suggests that in a war national leaders tend to rally support by demonizing the enemy. *Id.* The same holds true in judicial confirmation proceedings in which the contending sides follow a similar strategy. Bork was famously characterized as well outside the mainstream, while a series of successful nominees have been defended as moderate or principled conservatives in the great tradition of justices whom most senators are thought to admire and want nominees to resemble.



that started with Truman.<sup>28</sup> In the next two parts, I explore the significance of breaches of these norms.

### III. MODELS OF WAR

This Part surveys two basic models of conflict in lower-court judicial selection. In turn, I consider warrior presidents who have invited conflict and other presidents who have ignored or discounted appointments norms at their own or their judicial nominees' peril.

#### A. *The Warrior Presidents*

In the classic *The Art of War*, Sun Tzu makes two trenchant observations that one might imagine would resonate with most presidents in making Supreme Court nominations. The first observation is, "To win without fighting is best."<sup>29</sup> The other observation is, "The side that knows when to fight and when not will take the victory. There are roadways not to be traveled, armies not to be attacked, walled cities not to be assaulted."<sup>30</sup> One has to wonder why any president would disregard either of these observations, but many seem to have done just that. So one obvious question with which to begin an analysis of the models of conflict within federal judicial selection is why presidents sometimes welcome fights. That some welcome contests is beyond any doubt. I refer to such presidents as the warrior presidents. These are the presidents who have deliberately taken approaches that have provoked conflict with the Senate. The warrior presidents in American history seem to have had at least one important thing in common: they have invited heated conflicts over nominees for the sake of either fortifying their prerogatives or reshaping the basic institutional norms in the federal appointments process.

The most devastating defeats warrior presidents have had in the judicial selection process have involved their direct attacks to weaken or alter senatorial courtesy. At least three presidents, upon taking office, immediately set their sights on challenging senatorial courtesy in lower-court judicial appointments. All three – Ulysses Grant, Herbert Hoover, and Jimmy Carter – paid enormous prices, particularly within their own parties, for their boldness.

Grant's first Attorney General, Ebenezer Hoar, angered Republican senators by refusing to grant them *carte blanche* in their recommendations for federal judges in their respective states; he insisted

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<sup>28</sup> Shortly after taking office, President George W. Bush discontinued the policy. Robert S. Greenberger, *ABA Loses Major Role in Judge Screening*, WALL ST. J., Mar. 23, 2001, at B8.

<sup>29</sup> SUN TZU, *THE ART OF WAR* ch. vii (Thomas Cleary trans. 1988).

<sup>30</sup> *Id.* at ch. viii.

instead on higher standards for judicial nominees, and many senators balked.<sup>31</sup> This insistence eroded good will between many senators and the White House, and in the end, it cost Grant and Hoar dearly when the Senate refused to confirm Hoar's nomination as an Associate Justice as retaliation for Hoar's conduct as Attorney General.

Interestingly, Herbert Hoover tried to follow a similar path as Grant almost immediately after taking office in 1928. President Hoover wanted to end patronage appointments, particularly to the federal courts. Shortly after his inauguration, he released a statement that he intended to end the practice of awarding judicial appointments based solely on patronage and instead planned to raise the standards and requisite qualifications for judicial appointments.<sup>32</sup> As Sheldon Goldman observes, "Herbert Hoover, with the aid of his Attorney General, William Mitchell, attempted to break the grip that Republican senators had on lower-court appointments in order to improve the quality of the appointees. This resulted in several battles with Republican senators and ultimately in an administration retreat."<sup>33</sup> The retreat was only part of the bigger story, for the battles helped to erode Hoover's relations with his fellow Republicans in the Senate. He increasingly lost influence over both domestic policy and Supreme Court appointments. Before the end of his single term as president, he found himself at the other extreme from which he started and acquiesced to the Senate's preferred candidate to replace Justice Oliver Wendell Holmes.<sup>34</sup>

In 1976, Jimmy Carter won the presidency based in part on his pledge to base high-level appointments on merit rather than patronage.<sup>35</sup> Fulfilling his pledge required, *inter alia*, challenging senatorial courtesy for the sake of improving the quality and diversity of judicial appointments. He tried, through legislation, executive orders, and negotiations to have merit-select commissions established that would recommend, either to senators or to him, a slate of qualified persons for each judicial vacancy.<sup>36</sup> Over time, serious friction developed between Carter and various senators within his own party over their willingness to follow his criteria in recommending candidates for various judgeships. Tension also developed within the administration over the priorities for, and means to achieve, administration objectives. It hardly helped that Carter's chief rival for leadership of his party, Ted Kennedy, chaired the Judiciary Committee and used his powers as chairman to try to

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<sup>31</sup> JOSEPH HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 74-75 (1953).

<sup>32</sup> *FEDERAL APPOINTMENTS PROCESS*, *supra* note 7, at 146.

<sup>33</sup> GOLDMAN, *supra* note 21, at 9.

<sup>34</sup> See HARRIS, *supra* note 31, at 115-32.

<sup>35</sup> GOLDMAN, *supra* note 21, at 238.

<sup>36</sup> *Id.*

implement new norms for judicial selection and in some instances to thwart or embarrass Carter.<sup>37</sup> While President Carter succeeded in appointing unprecedented numbers of women and minorities as federal district and appellate judges,<sup>38</sup> his success came at the enormous cost of fractured relations with senators from his own party.

In two other instances, presidents have challenged some basic procedures, other than senatorial courtesy, for appointing judges. The first involved President George H.W. Bush's frustration over the Senate Judiciary Committee's access to FBI reports.<sup>39</sup> Just as the Judiciary Committee was preparing to send Clarence Thomas' nomination as an Associate Justice to the full Senate for final consideration, the Judiciary Committee leaked Anita Hill's affidavit to the Justice Department. This leak led to an embarrassing turnaround by the Committee to reopen its hearings on Thomas, including its calling Hill and recalling Thomas in dramatic, televised appearances before the Committee to address her sexual harassment charges against him. Though the Senate ultimately confirmed Thomas by an extremely close vote,<sup>40</sup> President Bush announced shortly after the final vote that he had issued an order restricting the Committee's future access to FBI reports. The order provoked an impasse that lasted for three months while the Committee refused to process any pending judicial nominations, until it could arrange for its own investigation of the backgrounds of nominees to substitute for the FBI reports. After three months, the administration changed course by restoring access for Committee members and staff to FBI reports, but with a stricter accounting of who would be allowed to read the reports. The delay was fatal to over two dozen judicial nominations made after the impasse, because their earliest opportunities for hearings would not be until 1992, during which time the process slowed down almost to a complete standstill pending the outcome of the presidential election.

More recently, President Bush's son, George W. Bush, openly challenged a different procedure. Shortly after taking office, President George W. Bush's White House Counsel announced the administration's intentions to curtail the practice of using the American Bar Association to pre-screen possible judicial nominees; the practice began in 1946 and extended through the end of the Clinton administration.<sup>41</sup> Ever since the ABA gave a mixed rating to Robert Bork in his confirmation hearings, many Republicans had questioned the organization's claim that its

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<sup>37</sup> *Id.* at 261-63.

<sup>38</sup> Carl Tobias, *Increasing Balance on the Federal Bench*, 32 HOUS. L. REV. 137, 141-42 (1995).

<sup>39</sup> *Bush's Judicial Legacy*, *supra* note 22, at 283-84.

<sup>40</sup> Michael J. Gerhardt, *Divided Justice*, 60 GEO. WASH. L. REV. 969, 970 (1992).

<sup>41</sup> *See Norm Theory*, *supra* note 11, at 1712-13.

ratings are based on professional credentials and not to some extent on the ideology of judicial nominees. In 1997, Senator Orrin Hatch, then the Chairman of the Judiciary Committee, concluded that these questions had sufficient merit to justify abandoning the ABA's privileged status in testifying about the quality of judicial nominees.<sup>42</sup> Despite this edict, President Clinton continued to consult informally with the ABA prior to making his judicial nominations. President Bush's decision to deny the ABA any privileged status in rating nominees provoked criticism from many Democratic senators. After regaining control of the Senate in May 2001, they retaliated by slowing down all pending judicial nominations to provide the ABA with the opportunity to rate the quality of the President's nominees.<sup>43</sup> President Bush has been able to move faster than his predecessors in making judicial nominations because his staff has not had to wait for the ABA to rate prospective nominees prior to their formal nominations. However, his nominees have each had to wait roughly six weeks after having been nominated to allow the ABA sufficient time to rate their judicial qualifications for the Democrats on the Judiciary Committee.

Beyond the challenges that the Bushes have made to certain procedures in judicial selection, they joined President Reagan in attempting to establish a new, or evolving, norm of judicial selection.<sup>44</sup> Beginning with President Eisenhower, but with increasing emphasis from the Carter through the current Bush administrations – with the possible exception of Bill Clinton's presidency – presidents have considered a person's likely ideology as an important factor in their nomination as a federal judge.<sup>45</sup> Moreover, during this same period, one

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<sup>42</sup> Richard Barbieri, *Don't Muzzle the ABA on Judicial Nominees*, THE RECORDER, Feb. 21, 1997, at 4.

<sup>43</sup> See Constitution Project, *New Data from Constitutional Project Show Increased Delays in Filling Federal Judgeships*, available at [http://www.constitutionproject.org/ci/press\\_release\\_fedcourtpd.htm](http://www.constitutionproject.org/ci/press_release_fedcourtpd.htm) (Mar. 6, 2002) (indicating that judicial nominations have slowed down both to allow for ABA input on pending nominations and to address anti-terrorist legislation in the aftermath of the September 11, 2001 attacks against the United States).

<sup>44</sup> Yet another norm to evolve over the past few decades is prior judicial experience as a prerequisite for being nominated to the Supreme Court. See Lee Epstein et al., *The Norm of Prior Judicial Experience*, 91 CAL. L. REV. (forthcoming Jan. 2003).

<sup>45</sup> See, e.g., HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS 191 (1999) (suggesting President Eisenhower may have helped to create the norm of prior judicial experience as an indispensable criterion for nomination the Court because of the belief that an examination of a nominee's record as a lower court judge would "provide an inkling of his philosophy") (quoting Eisenhower); John R. Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, 3 MIDWEST J. POL. SCI. 1, 41 (1959) (claiming that "[i]t may be properly suspected that those who urge [the perpetuation of the norm of prior judicial experience] consciously or subconsciously assume that 'good' judges are those who are apt to render decisions in accordance with [their] ideological predilections . . ."); DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 57 (5th ed. 2000)

of the most common reasons for opposing judicial nominees has been doubt about or opposition to their likely judicial ideologies.<sup>46</sup> The extremely low percentage of President Reagan's appellate court nominees made on the basis of partisan considerations reflects his administration's inordinate emphasis on ideology as an indispensable criterion for appointment.<sup>47</sup> With this emphasis, the Reagan administration helped to enshrine within the modern era an approach to judicial selection that effectively counted a candidate's likely ideology as an indispensable qualification for his or her appointment as a judge. Subsequent Republican administrations have tried to give ideology a similar degree of emphasis in the nomination process. And the vast majority of President Clinton's judicial nominees who experienced substantial or fatal delays in confirmation proceedings, as well as the one judicial nomination made by President Clinton rejected by the Senate – Ronnie White – had their nominations opposed because of Republican senators' distrust of their likely ideologies.<sup>48</sup>

Both the Senate Judiciary Committee's rejections of Judges Charles Pickering and Priscilla Owen and the slow pace of judicial confirmation proceedings reflect Democrats' concerns not just for payback but also for opposing what they regard as extreme or outside-of-the-mainstream judicial ideologies. The ensuing focus of both sides on judicial nominees' likely ideologies reflects an important dynamic in judicial selection in which, in effect, Republicans and Democrats are vying to define or control the formation of a new norm to govern judicial selection. Rhetoric is an important weapon in this battle, as both sides seek to characterize in the extreme the ideologies of the nominees whom they oppose. Each side casts its nominees as being within the mainstream and many of the other side's nominees as well outside of it. Republicans and Democrats are vying to define the mainstream that they each can use as a yardstick by which to measure the legitimacy of judicial ideologies. In short, they are fighting to define the mainstream of American constitutional law.

The fight to define the mainstream of American constitutional law coincides strikingly with unprecedented delays in the nomination and confirmation phases of the judicial selection process. A recent report of the Constitution Project indicates that the process for filling judicial vacancies is taking longer than ever; the time for filling them has increased from 38 days during the first two years of President Carter's term to 226 days during the last two years of President Clinton's

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("Judges and scholars perpetuate the myth of merit. The reality, however, is that every appointment is political.").

<sup>46</sup> See Constitution Project, *Justice Held Hostage*, at <http://www.constitutionproject.org/ci/reports/fedcourtpd.pdf> (2002).

<sup>47</sup> See GOLDMAN, *supra* note 21, at 307.

<sup>48</sup> See *Clinton's Judges*, *supra* note 23, at 232-41.

administration.<sup>49</sup> The study further indicates a steady decline in the percentage of a president's first-year nominations confirmed by the Senate during that first year.<sup>50</sup> The Senate confirmed 93% of President Reagan's first-year judicial nominations in 1981.<sup>51</sup> In contrast, the Senate confirmed only 44% of President George W. Bush's nominations in 2001.<sup>52</sup> In addition, in the first year of President George W. Bush's administration the Senate took longer to confirm judges – an average of 112 days – from the earlier Senates under review, with the exception of the first year of President Clinton's second term – an average of 133 days.<sup>53</sup> The delays are due to various factors, including the change in Senate leadership in mid-2001 as well as the fact that the Democrats have been deferring Senate consideration of judicial nominations until they have been reviewed by the ABA.<sup>54</sup>

In numerous other instances, presidents have not launched broad-scale attacks on senatorial courtesy or challenged basic procedures, but have breached norms in the course of choosing particular people to nominate as federal judges. These breaches have given rise to the conflicts discussed in the next section.

### *B. Mistakes in War*

The most common source of conflicts over judicial selection involves presidents' failures to follow or heed institutional norms or long-standing expectations or practices. Presidents have numerous reasons for these failures, though much more often than not, these failures can be traced to the specific circumstances in which presidents choose, for political or other reasons, to prioritize other short- or long-term objectives.

The first significant failure made by some presidents has been not to consult with the senator(s) from their parties in the state in which the judgeships they are trying to fill are located. The failure is almost

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<sup>49</sup> Constitution Project, *supra* note 43.

<sup>50</sup> *Id.* at 6-7.

<sup>51</sup> CONSTITUTION PROJECT, FIRST YEAR VACANCIES AND NOMINATIONS, at <http://www.constitutionproject.org/ci/reports/FirstYear.pdf>, at 1 (last visited Nov. 2, 2002).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> The study further indicates, as I have previously suggested, that President George W. Bush (to date) takes a shorter amount of time to make judicial nominations than his three predecessors. On average, he nominated a candidate within 165 days of a vacancy (or the date he took office), while the corresponding averages for Clinton's first year was 253, for President George H.W. Bush's was 193, and for President Reagan's was 191. Of course, one major difference between President Bush and his three predecessors is that he is the only one not to have allowed the ABA to rate the quality of the nominees prior to their formally being nominated. The additional time required for the ABA to provide its ratings accounts in part for both the quicker pace with which President Bush makes nominations and the slower pace with which the Senate is considering them. *Id.*

invariably fatal to a nomination's success, and surprisingly triggers sanctions, not from senators from the opposition party, but from the President's own party.

These sanctions have been applied, regardless of the President's popularity. For instance, President Franklin Roosevelt was convinced that senatorial courtesy was an antiquated concept<sup>55</sup> and sometimes ignored it to pursue other priorities, though in these instances with virtually no success. For instance, in 1938, he nominated Floyd Roberts, a New Deal supporter, to a federal district judgeship in Virginia.<sup>56</sup> The state's two Democratic senators were philosophically opposed to the New Deal and thus to Roberts, while the state's governor, former governors, and one influential congressman supported both the New Deal and Roberts. The two senators effectively rallied other senators partly on the ground of preserving the prerogative of senatorial courtesy and helped to spearhead the Senate Judiciary Committee's rejection of the nomination 15-3 as well as the full Senate's defeat of the nomination 72-9.<sup>57</sup>

Interestingly, President Roosevelt's subsequent strategy for filling the judgeship paid homage to senatorial courtesy. Roosevelt offered the judgeship to Armistead Dobie, then the dean of the University of Virginia School of Law.<sup>58</sup> Though Roosevelt had not consulted Virginia senators in offering the position to Dobie, he nevertheless consulted with them and got their approval before formally forwarding the nomination to the Senate. With the senators on board, the nomination easily and quickly was confirmed by the full Senate.<sup>59</sup>

In 1943, President Roosevelt made an even bolder attempt to bypass senatorial courtesy, which failed. He nominated James Allred to fill a federal district judgeship in Texas.<sup>60</sup> Allred had the support of one Texas senator and other influential Democratic leaders in the state, but he also ran unsuccessfully to unseat the other Texas senator, W. Lee O'Daniel. Not surprisingly, O'Daniel vigorously opposed nominating his rival to fill the judgeship, and the Judiciary Committee was split evenly on recommending the nomination for the full Senate to consider. While Allred asked at this point that his nomination be withdrawn, President Truman was able later to appoint him as a federal judge after O'Daniel left the Senate.<sup>61</sup>

Though Harry Truman as a former senator should have understood the importance of senatorial courtesy, he sometimes miscalculated and

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<sup>55</sup> See GOLDMAN, *supra* note 21, at 18-30.

<sup>56</sup> *Id.* at 42-43.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 43-44.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 41-42.

<sup>61</sup> *Id.*

failed to take it adequately into account in making nominations. In one flagrant failure, he failed to consult with Senator Richard Russell before he nominated M. Neil Andrews to a federal district judgeship in Georgia.<sup>62</sup> Truman figured that he did not have to consult with Russell on this appointment because he had already given Russell his due by agreeing to another choice of Russell's for a different judicial vacancy in his state. The problem was that Russell preferred a different candidate, William Boyd Sloan, and thus vigorously opposed the Andrews nomination. He initially helped to stall its consideration, causing Truman to give Andrews a recess appointment, just as Roosevelt had done with Roberts. Nevertheless, both the Judiciary Committee and the full Senate voted to reject Andrews's nomination. While Truman was not pleased with the rejection, he reluctantly agreed to nominate Sloan instead to the judgeship, and the Senate quickly confirmed him.<sup>63</sup>

A second, major reason for frustrated or defeated judicial nominations is poor timing. As Sheldon Goldman explains, "Traditionally, minimal confirmation activity occurs during presidential election years, especially when the Senate is controlled by one party and the White House by another."<sup>64</sup> Statistics amply demonstrate the robustness of this basic norm. For instance, at the end of 2000, the Senate had not acted on thirty-two district and eight circuit court nominations that were pending at the end of the year.<sup>65</sup> In 1992 the Senate had not acted on forty-two district and five circuit court nominations made by President Bush.<sup>66</sup>

Timing can make a big difference in judicial selection in a different form: the pacing of the confirmation process. Over the years, senators have developed numerous parliamentary and procedural mechanisms to facilitate their input on judicial appointments. These include, but are not limited to, individual senators' prerogatives to place any judicial nominations temporarily on hold or filibuster. Nor are they limited to the Judiciary Committee Chair's implied authority to control the scheduling of hearings, numbers of witnesses, and timing of votes; or the majority leader's authority to control everything that comes to the floor of the Senate.<sup>67</sup> The instances in which senators have used one or more of these means to frustrate judicial nominations are legion. As one might expect, senators employ these mechanisms for many reasons, including

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<sup>62</sup> *Id.* at 71-72.

<sup>63</sup> *Id.*

<sup>64</sup> *Bush's Judicial Legacy*, *supra* note 22, at 284.

<sup>65</sup> *Senate Republicans Continue to Criticize Democrats over Pace of Judicial Confirmations*, BULL. FRONTRUNNER, Dec. 14, 2001.

<sup>66</sup> Thomas L. Jipping, *Why Were These Judges Approved?*, WASH. TIMES, Aug. 1, 1996, at A1.

<sup>67</sup> See FEDERAL APPOINTMENTS PROCESS, *supra* note 7, at 135-79.



protecting senatorial courtesy, rewarding friends, payback, logrolling, and enforcing conceptions about the proper qualifications for judicial appointments. Five examples dramatically illustrate the significance of these mechanisms over time.<sup>68</sup>

First, in 1959, Lyndon Johnson became the first Senate Majority Leader to stall all pending judicial nominations until the President agreed to nominate his preferred candidate for a judgeship in Johnson's home state.<sup>69</sup> Johnson's strategy worked; the Senate confirmed Joe Fisher three days after President Eisenhower nominated Johnson's friend to the judgeship, and the logjam was broken.

Second, shortly after assuming the chairmanship of the Senate Judiciary Committee in 1979, Ted Kennedy introduced several innovations for judicial confirmation proceedings.<sup>70</sup> He announced that senators who withheld the "blue slips" of persons nominated for judgeships from their states could no longer rely on the Chair to kill those nominations. Kennedy directed that every nomination would be discussed by the full Committee, and the Committee would determine whether to proceed with a nomination by holding a hearing. In addition, Kennedy arranged for the Committee to adopt a questionnaire that all nominees would be required to complete and that, with the exception of a few questions, would be made available to the public. The Committee also began to routinely publish its confirmation proceedings. Moreover, Kennedy invited various groups to testify before the Committee and to rate judicial nominees. An especially important innovation was the establishment of the Committee's own investigatory staff to examine the backgrounds of judicial nominees apart from Justice Department inquiries.<sup>71</sup>

Third, as Chairman of the Senate Judiciary Committee, Orrin Hatch placed all judicial nominations on hold through the first half of 1999, both to wait for the completion of President Clinton's impeachment trial in February 1999 and to have the President nominate his preferred candidate, Ted Stewart, to a federal judgeship in his home state of Utah. Eventually, Clinton and Hatch choreographed an exchange.<sup>72</sup> For his part, President Clinton agreed to begin the vetting process for nominating Stewart, while Hatch agreed that as long as Stewart continued to progress through the appointments process, he would begin to hold hearings on some pending nominations.<sup>73</sup> In October, the Senate

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 141.

<sup>70</sup> GOLDMAN, *supra* note 21 at 263.

<sup>71</sup> *Id.*

<sup>72</sup> FEDERAL APPOINTMENTS PROCESS, *supra* note 7, at 141.

<sup>73</sup> Carl Tobias, *Judicial Selection at the Clinton Administrator's End*, 19 LAW & INEQ. 159, 176 (2001).

confirmed Stewart, though most of the other pending nominations never reached the floor of the Senate for a final vote.<sup>74</sup>

Fourth, the Judiciary Committee rejected both Pickering and Owen by a strict party-line vote, and both rejections have intensified a vicious cycle of payback.<sup>75</sup> For instance, the vote on Pickering infuriated Republicans, including President Bush and Pickering's sponsor Minority Leader of the Senate, Trent Lott, both of whom had lobbied hard for the judge's confirmation. By another vote strictly along party lines, the Committee majority also rejected the President's and Senator Lott's pleas to allow the nomination to be forwarded to the floor of the Senate for a full vote.<sup>76</sup> Lott appealed in vain to the Senate Majority Leader Tom Daschle to intercede and forward the nomination to the Senate floor. Both refusals to forward the nomination were not unusual, for Lott as Majority Leader had consistently refused the same entreaties from Daschle when their roles were reversed from 1994-2000.<sup>77</sup> The Judiciary Committee for decades had not forwarded to the floor a nomination that a majority had refused to endorse.<sup>78</sup> Nevertheless, Republican senators led by Trent Lott retaliated immediately through a series of parliamentary maneuvers to impede other business in the Senate.<sup>79</sup> Lott also exacted revenge against Daschle by announcing that he would no longer support Daschle's preferred candidate for a Democratic slot on the Federal Communications Commission and thereby scuttled the candidate's nomination.<sup>80</sup>

Fifth, since regaining control of the Senate in 2001, Democrats have succeeded in slowing the pace of judicial confirmation proceedings. By the end of 2001, the Senate had confirmed only twenty eight of President Bush's eighty judicial nominations.<sup>81</sup> Moreover, of President Bush's first eleven circuit court nominations made in May of 2001, the Senate has not held hearings, much less taken final action on eight of them, including the following: legal scholar Michael McConnell, nominated by President Bush to the U.S. Court of Appeals for the Tenth Circuit; John Roberts, nominated by President Bush to the U.S. Court of Appeals for

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<sup>74</sup> Dawn House, *With "Hatch Express" Gone, Judiciary Crisis Hits Utah*, SALT LAKE TRIB., Dec. 27, 2001, at A1.

<sup>75</sup> Jesse J. Holland, *Democrats Reject Bush 5th Circuit Nominee*, ADVOCATE, Sept. 6, 2002, at 2A.

<sup>76</sup> *Senate Rejects Pickering Nominee*, BULL. FRONTRUNNER, Mar. 15, 2002.

<sup>77</sup> *See Clinton's Judges*, *supra* note 23, at 235.

<sup>78</sup> *See Norm Theory*, *supra* note 11, at 1715, n.23.

<sup>79</sup> *See James Brosnan, Federal Bench Nominees Left in Limbo; Bickering Curdles Senate into Inaction*, THE COM. APPEAL, Mar. 23, 2002, at A1.

<sup>80</sup> *FCC Briefs; Adelstein Nomination on Hold Again*, 21 FCC REP. 19, Sept. 20, 2002.

<sup>81</sup> David G. Savage, *Judicial Nominees Go 28 for 80 in the Senate*, L.A. TIMES, Dec. 31, 2001, at A1.

the District of Columbia (almost a decade after the Senate had failed to act on his nomination to the same court by President George H.W. Bush); and Carolyn Kyl, nominated by President Bush to the U.S. Court of Appeals for the Ninth Circuit.<sup>82</sup> Twenty-two circuit nominations are pending before the Committee, and President Bush has yet to nominate people for nine other vacancies on the federal courts of appeals.<sup>83</sup> Michigan's two Democratic senators have put holds on all three of the President's nominees to the U.S. Court of Appeals for the Sixth Circuit in retaliation against the Republicans' fatal holds on two Democratic nominees to the same court.<sup>84</sup> Senator Patrick Leahy of Vermont, the Chair of the Senate Judiciary Committee, has explained that the delays are, to some extent, due to the need to handle other priorities including anti-terrorist legislation. Republicans charge that the delays are attributable primarily to the preferences of Committee Democrats for liberal activist judges and hostility to qualified conservative judicial nominees. Other observers suggest that the delays are payback for the Republicans' delays of many of President Clinton's judicial nominations,<sup>85</sup> including forty at the end of his administration.<sup>86</sup>

As these and many other examples amply illustrate, senators' opposition or resistance to judicial nominees is attributable to many different reasons, including, but not limited to, doubts in many instances about the nominees' qualifications. To be sure, there has never been any consensus in the Senate on the minimal qualifications for federal judges. Nor has there been any meaningful agreement in recent years on whether there is some objective measure of judicial qualifications. The one major exception is that senators over the years have insisted that judicial nominees have, *inter alia*, the requisite integrity to serve as federal judges. Hence, nominees' ethical lapses are a frequently cited basis for rejecting or opposing many judicial nominations.<sup>87</sup>

Other common questions that have arisen about nominees' qualifications relate to their trial practice (particularly for district judges), temperament, participation in activities unsuitable for judges (such as membership in discriminatory clubs), and judicial philosophy. Three dramatic illustrations of these concerns in practice are (1) the Senate Judiciary Committee's close vote on and the Senate's eventual

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<sup>82</sup> *Courting Tension Statistics Don't Tell the Whole Story of Judicial Nominations Fight*, LEGAL TIMES, Dec. 24, 2001, at 31.

<sup>83</sup> Adam Nagourney, *Economy Stirs G.O.P. Worry in the White House Races*, N.Y. TIMES, Aug. 6, 2002, at A1.

<sup>84</sup> John Nowacki, *Leahy Presides over Judicial Vacancy Crisis*, INSIGHT ON THE NEWS, June 3, 2002, at 46.

<sup>85</sup> *Norm Theory*, *supra* note 11, at 1706-09.

<sup>86</sup> See Savage, *supra* note 81 (citing Professor Sheldon Goldman).

<sup>87</sup> See generally GOLDMAN, *supra* note 21.

confirmation of former Connecticut Governor Thomas Meskill, whom President Nixon initially nominated and President Ford renominated to the Second Circuit in spite of the ABA's rating of him as "not qualified";<sup>88</sup> (2) the forced withdrawal of President Reagan's nomination of former Louisiana Governor David Treen to the Fifth Circuit based on his past participation in the segregationist Louisiana States' Rights Party;<sup>89</sup> and (3) the Judiciary Committee's negative vote on President Reagan's nomination of Jeff Sessions to a federal district judgeship in Alabama and split vote on forwarding it to the Senate floor, effectively killing it, based on several racially insensitive statements made by Sessions.<sup>90</sup>

#### IV. ACHIEVING PEACEFUL COEXISTENCE

Achieving peaceful coexistence throughout the phases of judicial selection is not easy, particularly in times of divided government. Even when the same party controls both the White House and the Senate, peaceful coexistence is hard to achieve. In the first years of their respective presidencies, Woodrow Wilson and Bill Clinton both endured tense relations with their fellow Democrats for the same basic reason: each became the first Democratic president after relatively long periods in which the other party had occupied the White House, sixteen for Wilson and twelve for Clinton. Thus, from the outset of these presidencies, many Democratic senators felt that they were long overdue in having their preferred candidates fill the vacant judgeships in their respective states.<sup>91</sup> Clinton's difficulties clearly extended to the selection of Supreme Court justices, so that, even though Democrats controlled the Senate Judiciary Committee and the Senate, he did not want to expend precious political coinage in defending his nominees in protracted confirmation proceedings rather than on legislative priorities.<sup>92</sup>

Presidents have pursued at least three strategies to deal with the difficulties in achieving peaceful coexistence in judicial selection. The first is simply to abdicate presidential authority in choosing nominees and defer almost completely to senators' preferences. Such deference was relatively common throughout the nineteenth century, particularly when

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<sup>88</sup> Deborah Pines, *New Chief Judge Meskill Won Them Over*, N.Y.L.J., June 29, 1992, at 1. Note that this close vote lead the Ford administration to avoid thereafter nominating other people rated by the ABA as "not qualified" to federal judgeships.

<sup>89</sup> Richard Connelly, *New Voices Divide Court That Desegregated South*, LEGAL TIMES, May 30, 1988, at 30.

<sup>90</sup> Philip Hager, *Panel's Action Only Second Such Turndown in Forty-nine Years: Reagan Judicial Nominee Rejected*, L.A. TIMES, June 6, 1986, at 4.

<sup>91</sup> See Michael J. Gerhardt, *The Confirmation Mystery*, 83 GEO. L.J. 395, 410 n.73 (1994) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENT PROCESS* (1994)); *FEDERAL APPOINTMENTS PROCESS*, *supra* note 7, at 98-99.

<sup>92</sup> *Clinton's Judges*, *supra* note 23, at 237.

the same party controlled the White House and the Senate, and judicial nominations were made on the basis of party affiliation and activity.<sup>93</sup>

In the twentieth century, the President who came closest to complete abdication was Warren G. Harding.<sup>94</sup> Indeed, the Republican party establishment backed Harding as President, in part because it believed he would accede to its preferences for lower-court judicial nominees and other important appointments. As President, Harding made clear from the outset his desire to return to "normalcy," which, in the area of judicial selection, meant granting to the senators from his party their preferred choices to fill the judgeships in their respective states.

A second strategy is to accept, perhaps even to invite, some conflict over judicial appointments to demonstrate the President's strength and to define both the President and his enemies through such conflicts. Perhaps the best or most dramatic example of a nineteenth-century president who followed this strategy was Andrew Jackson.<sup>95</sup> The clearest example in the twentieth century is William Howard Taft.<sup>96</sup> Ronald Reagan<sup>97</sup> and George W. Bush<sup>98</sup> have followed this strategy as well.

A third strategy falls between these other two strategies. It entails negotiating and otherwise coordinating or managing the governing norms of judicial selection to achieve or maintain relatively peaceful coexistence. Negotiations between presidents and senators have produced many different arrangements. The first arrangement is the creation of new judgeships over which presidents have greater latitude to fill – used, for example, by President Carter to appoint people from under-represented groups without taking opportunities away from established constituencies.<sup>99</sup> Another arrangement is senators' providing

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<sup>93</sup> Kermit Hall comprehensively examines the patterns of judicial appointments in the 19<sup>th</sup> century. He notes, for example, that Martin Van Buren's judicial appointments were "more party directed than [those made] during Jackson's administration." HALL, *supra* note 19, at 29. Van Buren made 17 lower-court nominations; and, unlike Jackson's, Van Buren's nominees, with only one exception, met no opposition in the Senate. *Id.* Similarly, in making ten lower-court judicial appointments as president, Zachary Taylor "wielded . . . judicial patronage in an outwardly party-directed fashion." *Id.* at 90. The same was true later in the century for Republican presidents Hayes, Garfield, and Arthur; and Grover Cleveland based all thirty-four of his lower-court appointments on party considerations. FEDERAL APPOINTMENTS PROCESS, *supra* note 7, at 129-30.

<sup>94</sup> See HARRIS, *supra* note 31.

<sup>95</sup> HALL, *supra* note 19, at 1-26.

<sup>96</sup> See FEDERAL APPOINTMENTS PROCESS, *supra* note 7, at 100.

<sup>97</sup> See GOLDMAN, *supra* note 21, at 285-319.

<sup>98</sup> Amy Goldstein, *Bush Blasts Democrats for Lagging on Judicial Nominees*, WASH. POST, May 4, 2002, at A04; Amy Goldstein *White House Pushing Harder to Confirm Judges*, WASH. POST, Apr. 15, 2002, at A06; Stewart M. Powell, *Bush Goes to Mat for Judicial Nominee*, SEATTLE POST INTELLIGENCER, Mar. 7, 2002, at A3.

<sup>99</sup> See, e.g., *Clinton's Judges*, *supra* note 23, at 243-52.

lists of names of acceptable candidates chosen pursuant to criteria set forth by an administration, a practice used during President Reagan's first term with mixed success.<sup>100</sup> A third arrangement allows states with senators from both parties to alternate in making recommendations to the President, variations of which were used by New York's senators from the 1970s through the 1990s<sup>101</sup> as well as by Washington's two senators from 1997 until the end of the Clinton administration.<sup>102</sup> A final arrangement involves making a trade in which a senator gets his or her preference for a judicial appointment on a court in exchange for the President's getting his preferred candidate appointed to the same or some other court. This strategy was employed, for instance, by President Clinton and Washington's Senator Slade Gorton to fill two pending vacancies on the U.S. Court of Appeals for the Ninth Circuit.<sup>103</sup>

Some negotiations between presidents and senators are more visible than others, and the degree or extent of visibility is a factor in their success. For instance, President Dwight Eisenhower, who generally preferred to operate through a hidden hand,<sup>104</sup> set the guiding principles for judicial selection and charged the Justice Department with the responsibility for implementing them. His staff largely insulated him from the political pressures of the process. In practice, this meant that the Justice Department became "the locus of dealing with members of Congress,"<sup>105</sup> and neither Eisenhower nor his Justice Department ever directly challenged the Senate. Hence, the Senate did not reject any of his nominees. To be sure, there were conflicts, and Eisenhower could be embarrassed or coerced into accepting a senator's preference, as he was with Lyndon Johnson in 1959. Yet, senators from both parties quickly

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<sup>100</sup> President Reagan cut a deal with the Senate Majority Leader Howard Baker and the Chair of the Senate Judiciary Committee Strom Thurmond "to give the administration more flexibility in naming district judges while retaining senatorial influence." GOLDMAN, *supra* note 21, at 287-88. The plan was for Republican senators to provide the President with a list of three to five names for each judicial vacancy to be filled in their respective states. The recommendations were to be made pursuant to criteria set forth by the administration. While the plan was successfully implemented early in Reagan's presidency, it eventually fell apart. Some Republican senators chafed from the outset at having to meet any selection criteria and went back to recommending to the President only a single name for each vacancy in their states, while the slate of people recommended by other senators became meaningless because they simply signaled their top preferences through other channels. *Id.* at 288-90.

<sup>101</sup> Stephan O. Kline, *The Topsy-Turvy World of Judicial Confirmations in the Era of Hatch and Lott*, 103 DICK. L. REV. 247, 299 (1999).

<sup>102</sup> See *Norm Theory*, *supra* note 11, at 1710 n.82.

<sup>103</sup> FEDERAL APPOINTMENTS PROCESS, *supra* note 7, at 140.

<sup>104</sup> See generally FRED GREENSTEIN, *THE HIDDEN HAND PRESIDENCY* (Johns Hopkins ed. 1994).

<sup>105</sup> GOLDMAN, *supra* note 21, at 131.

came to realize and accept that most trading occurs below radar and thus without public awareness or scrutiny.<sup>106</sup>

In contrast, Bill Clinton's negotiations with senators often became public, and the more public they became, the more it became a liability for President Clinton and his nominees.<sup>107</sup> President Clinton's initial strategy was to avoid any public fights over judicial nominees. His thinking was that the fewer high-profile contests, the less likely campaigns would be waged for and against nominees for the sake of scoring political points. In other words, lowering the visibility of the judicial selection process helped to depoliticize it, because this strategy would increase the likelihood of a more professional, less politically explosive negotiation over the merits of particular appointments. Indeed, President Clinton and his advisers invested less in nominating particular people than in nominating particular kinds of people. Their objective, which they believe they largely achieved, was to improve the quality and diversity of judicial appointments. They viewed many prospective candidates as fungible, so that they could gravitate away from the candidates likely to promise trouble and towards those that seemed to hold greater promise of relatively easy confirmation.

President Clinton's strategy and its implementation came at a price, though it did culminate in only one judicial nominee, Ronnie White, being rejected by the Senate.<sup>108</sup> First, the strategy contained the seeds of its own unraveling. Clinton's hope to avoid high-profile contests over judicial appointments merely signaled to opposition senators that they were likely to prevail in any contest, as long as they signaled their willingness to wage a highly visible campaign against a nominee. Once Clinton backed down early in his presidency when faced with such threats, he signaled the effectiveness of making the threat to wage a protracted, visible contest over a judicial appointment. Thus, senators recognized that the greatest leverage they had in negotiating with Clinton over prospective nominees was threatening to make a public contest, thus forcing the President to decide whether he wanted to expend his political capital in such a fight.<sup>109</sup>

Second, the bargaining phase of President Clinton's judicial selection entailed an entirely new approach in the pre-nomination phase of judicial selection. President Clinton and others began to see a perverse advantage to publicizing the pre-nomination phase of the process. While this practice helped the administration to settle on relatively strong

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<sup>106</sup> *Id.*

<sup>107</sup> See generally *FEDERAL APPOINTMENTS PROCESS*, *supra* note 7.

<sup>108</sup> For the story of the confirmation contest over White's nomination, see *Clinton's Judges*, *supra* note 23, at 239-41.

<sup>109</sup> *Id.*

nominees for many judgeships, it subjected many people to public evisceration. Indeed, the floating of possible candidates for judgeships became a substitute for the confirmation process, for the administration would often make choices of nominees based on the extent to which they could survive such public vetting. Senators and interest groups figured that they could influence the choices of possible nominees by quickly and publicly condemning or promoting certain nominees. In time, a relatively unseemly process evolved in which negotiations over nominees no longer occurred behind closed doors, as it had during the Eisenhower administration, but rather in newspapers and other public forums.

Third, President Clinton's bargaining was further complicated by his impeachment and other legislative priorities. Clinton needed to bargain in order to maintain or cultivate political support for other important initiatives, including his own survival in office. As a practical matter, this meant that he was often bargaining from a position of weakness or that his nominees, once nominated, could not rely solely on him for their success, and thus languished when he had to expend his political coinage on other matters. As Sheldon Goldman reports, Republican staffers acknowledged that one important reason many of Clinton's judicial nominees languished in his final year in office is that no one, not even Clinton, seemed willing to expend any efforts to get them hearings, much less floor votes.<sup>110</sup>

Interestingly, one tactic that helped Clinton and other presidents in the past – but notably not President George W. Bush in fighting for either Pickering or Owen – is to take the initiative in making and fighting on behalf of a high-profile nomination. This tactic is extremely important for avoiding submission, like that of President Harding. It has been used effectively by many presidents to clarify early on what they want in exchange for trading, as well as the preferences over which they will fight. Even though President Reagan clearly set the appointment of conservatives to the lower courts as a major priority of his administration, he picked his fights carefully.<sup>111</sup> Despite the extraordinary extent to which Reagan based his nominations on ideological rather than partisan concerns, Sheldon Goldman notes, "A characteristic of judicial selection during Reagan's first term was the apparent reluctance to engage in a confirmation fight in the Senate even if it meant sacrificing a philosophically desirable candidate . . . ."<sup>112</sup> Moreover, President Reagan was careful not to nominate people to the

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<sup>110</sup> *Id.* at 237-38.

<sup>111</sup> See GOLDMAN, *supra* note 21, at 286-96. Of course, there were some high-profile contests over some judicial nominations. The administration was apparently willing to fight over some but not other nominees because of the strength of the nominees' likely political backing or because it was trying to effectuate or implement a deal or trade. *Id.*

<sup>112</sup> *Id.* at 299-300.



courts of appeals unless he or his team was satisfied "that the nominee shared the administration's judicial philosophy. When a potential nominee had strong political backing but doubts were raised about the candidate's philosophical reliability, the burden was on the candidate's backers to demonstrate that the doubts were unfounded."<sup>113</sup> This approach reflected respect for senatorial courtesy and negotiating, while preserving and underscoring President Reagan's basic commitment to making judicial appointments a high-profile priority of his administration. President Reagan's willingness to use his popularity to fight for his nominees provided formidable leverage on their behalf, although it coincided significantly with his party's control of the Senate.

Both Presidents Abraham Lincoln and Franklin D. Roosevelt were as interested in their judicial nominees' philosophy as President Reagan was. But they often engaged in trading or deals to consolidate party support and to promote their domestic agendas, particularly during times of war.<sup>114</sup> Lincoln was notorious for employing patronage to secure support for party unity as well as his domestic agenda.<sup>115</sup> This practice is especially evident with his six Supreme Court appointments, all of which were made with significant input by party and Senate leaders.<sup>116</sup>

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<sup>113</sup> *Id.* at 305.

<sup>114</sup> Lincoln's deference was not, however, automatic or extreme; it was usually based on each side getting something out of the appointment. Lincoln's Supreme Court appointments would prove to be different only in degree, not in kind, from the other appointments he made as president. Consequently, he generally deferred to congressional leaders on the candidates for filling vacancies with the primary condition that they met criteria set forth for their selection by the President. In all six appointments he made to the Court, Lincoln faced no serious conflict with senators but instead was able to find nominees agreeable to Republican leaders each time. See Michael J. Gerhardt, *Putting Presidential Performance in the Federal Appointments Process in Perspective*, 47 CASE W. RES. L. REV. 1359, 1368-72 (1997).

Franklin D. Roosevelt is a second example of a president adept at employing institutional norms to get his way. When he finally got an opportunity to fill a vacancy on the Court, it did not happen until the beginning of his second term. When the vacancy finally arose in 1937, it proved to be a pivotal one, for the retiring justice was one of the most ardent opponents to constitutional foundations of the New Deal – Willis Van DeVanter. There was no question there would be a fight, because the appointment, if confirmed, would produce for the first time in the Court's history a critical mass of justices who opposed economic due process and supported greater judicial deference to congressional exercises of its Commerce Clause power. Roosevelt was not interested in a compromise. His nomination proved to be surprising not because he turned to a senator or an ardent supporter of the New Deal but rather he turned to someone who, as a senator, had not been known as a great constitutional thinker (like Sutherland) but as an ardent partisan. The views of his nominee, Hugo Black, were well known to his colleagues in the Senate, but the powerful norm of senatorial deference to the nomination of a colleague to the Court worked in Black's favor and led many senators who might have opposed him otherwise to accept his nomination begrudgingly. See GOLDMAN, *supra* note 21, at 15-64.

<sup>115</sup> See generally DAVID HERBERT DONALD, *LINCOLN RECONSIDERED* (1980).

<sup>116</sup> See Gerhardt, *supra* note 27, at 405-06.

Similarly, Franklin Roosevelt was acutely sensitive to prospective nominees' political backing throughout his presidency, particularly during World War II. As Sheldon Goldman further observes, "When the political backing was exceptionally strong and there were questions raised as to the candidate's fidelity to the New Deal, the benefit of the doubt was often given to the candidate."<sup>117</sup> Roosevelt's willingness to compromise derived from his recognition of the long-term benefits of agreeing to a particular senator's choices, and so he would often consider the impact his choice of a nominee would have on a senator's support for his administration.<sup>118</sup>

As the Lincoln and Roosevelt examples illustrate, a great deal depends on the popularity of the war during which judicial selection takes place. Only a few presidents have made Supreme Court nominations in times of war, two of which were fighting for a cause popular with most senators – Abraham Lincoln and Franklin D. Roosevelt. The point at which Roosevelt's approach to Supreme Court selection most closely resembled Lincoln's was the 1940s, the period in which the nation formally entered the Second World War. In these years, Roosevelt's nominees were Jimmy Byrnes in June 1941, Harlan Fiske Stone as Chief Justice also in June 1941, the day on which the Senate confirmed Byrnes, and Wiley Rutledge in February 1943.<sup>119</sup> Byrnes was a former senator and thus able to take advantage of senatorial courtesy. Stone was a Republican whose nomination bespoke of bipartisanship and a desire on the part of the President to put aside party differences as best he could under the circumstances. Rutledge was a relatively inoffensive nominee whom most senators did not know or take the time to know.<sup>120</sup>

Other presidents who have made judicial nominations in times of war include President Truman during the Korean War and Presidents Johnson and Nixon during the Vietnam War. They did not receive any special deference simply because their nominations coincided with an ongoing military conflict. One possible reason that none received special deference is that neither the Korean War nor the Vietnam conflict was popular, especially over time, with the American people. Another plausible reason they received no special deference is that senators drew a distinction between domestic and foreign policy, and thus their support for the latter did not have any effect on their support for the former.

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<sup>117</sup> GOLDMAN, *supra* note 21, at 33.

<sup>118</sup> *Id.* at 41.

<sup>119</sup> *See id.* at 15-64.

<sup>120</sup> *Id.*

## V. CONCLUSION

War is not inevitable in federal judicial selection. It can be avoided if national political leaders choose to follow the institutional norms that they have developed over the years to guide the appointments process. War breaks out when national political leaders, particularly presidents, breach these norms.

Because war is, in von Clausewitz's famous judgment, an extension of politics, one is left to wonder about the politics or motives driving combat over judicial appointments.<sup>121</sup> In considering the reasons for combat, I cannot help but recall a question raised by Winston Churchill in the midst of World War II. When asked whether the East End of London should be shut down and theater productions stopped because of the bombing of the city, Churchill is attributed with responding: "No. What . . . do you think we are fighting for?" As combats erupt over judicial appointments, it is useful to ask, in a similar vein, "What are each of the sides fighting for, and what do these contests tell us about them and, more importantly, about our values?"

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<sup>121</sup> CARL VON CLAUSEWITZ, *ON WAR* (Michael Howard & Peter Paret eds., 1976).